IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KYLE SCOTT VINSONHALER, Appellant.	No. 36235-0-II (consolidated with No. 36275-9-II) UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. KLINTON JAMES VINSONHALER, Appellant.	

Quinn-Brintnall, J. — A single jury found brothers Kyle Scott Vinsonhaler and Klinton James Vinsonhaler guilty of first degree child molestation for the digital penetration (Kyle)[1] and external touching (Klinton) of C.T., a seven-year-old girl. In separate appeals, which we consolidated for review, Kyle argues that he is entitled to a new trial because (1) the State

[1] First names are used for clarity.

improperly admitted Klinton's unredacted statement implicating Kyle in violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); (2) the trial court erred when it permitted Dr. John Stirling to testify under the child hearsay statute; and (3) his trial counsel's assistance was constitutionally deficient.[2] Klinton argues that his counsel's assistance was constitutionally deficient because his attorney failed to move to sever his case from Kyle's, properly impeach C.T., and object to the prosecutor's mischaracterization of the evidence during closing argument. Klinton also argues that sufficient evidence does not support his conviction.

Kyle's Conviction

In *Bruton*, the Supreme Court held that, despite clear, concise, and understandable instructions, the admission of a defendant's *confession* implicating his co-defendant at a joint trial was prejudicial error. To comply with *Bruton*, our Supreme Court adopted CrR 4.4(c), which requires separate trials unless the defendant's confession is redacted to exclude references implicating the co-defendant. Here, Klinton's statement to Vancouver Police Detective Steven Norton was not a confession implicating himself as well as Kyle and, as a result, was not an issue properly resolved under a *Bruton* analysis. Accordingly, although the parties and the trial court improperly applied the *Bruton* analysis to this case and *Bruton* does not apply, nonetheless the trial court did not err when it refused to sever the case for trial. We affirm Kyle's first degree child molestation conviction.

[2] In his statement of additional grounds (SAG), Kyle argues that (1) his right to due process was violated because the State failed to convene a grand jury; (2) the prosecutor improperly acted as both an advocate and a witness in the same proceeding when he filed the certificate of probable cause; (3) his trial counsel, as a member of the Washington State Bar Association (WSBA), had a conflict of interest that denied him effective assistance of counsel, counsel of his choice, and adequate preparation time; (4) he was denied his right to counsel when the police questioned him; and (5) his mental deficiencies made him incompetent to stand trial.

Klinton's Conviction

Because the trial court properly denied Kyle's counsel's motion to sever, Klinton's claim that his trial counsel was ineffective for failing to move to sever his trial from Kyle's likewise fails. Moreover, because cross-examination is a matter of trial strategy, Kyle's claim that his counsel was ineffective for failing to subject the seven-year-old victim to more rigorous cross-examination also fails. We affirm Klinton's first degree child molestation conviction.

FACTS

Factual Background

During the summer of 2005, C.T. and A.T. visited their grandmother in Vancouver, Washington. C.T. and A.T. were seven and nine years old at the time of their visit, respectively. According to their grandmother, on a particularly hot summer day, C.T. and A.T. asked for her permission to go on a bike ride with two older boys, Kyle and Klinton, as well as LaRay, an eight- or nine-year-old boy from the neighborhood. At the time, Kyle was 19 and Klinton was 17. Klinton lived with his parents in the same apartment complex as C.T. and A.T.'s grandmother; Kyle lived elsewhere, but visited his parents frequently. After talking to Kyle and Klinton about various safety issues, including where they were going and what time they must return, C.T. and A.T.'s grandmother gave them permission to go on the bike ride.

Shortly after the agreed upon time, Kyle, Klinton, C.T., A.T., and LaRay returned from the bike ride and went inside C.T. and A.T.'s grandmother's home. While inside, C.T. asked her grandmother to peel an apple for her; when her grandmother suggested that C.T. have either Klinton or Kyle do it for her, C.T. threw the apple down and "stormed" out of the room. 2 Report of Proceedings (RP) at 99. C.T.'s grandmother peeled the apple and gave it to her.

C.T.'s mother picked her up the same day and C.T. returned home.

From September 2005 until approximately March 2006, Angela Owens was the day-care provider for C.T., A.T., and their younger sister, M.S. In February 2006, several of the children in the day care began discussing "good touch" and "bad touch." When Owens heard the children talking about "good touch" and "bad touch," she sat the children down and talked to them about the difference between "good touch" and "bad touch" in very general terms. Specifically, Owens told the children that "inappropriate touches is anything that makes them feel uncomfortable and that they don't want . . . done." 1 RP at 34. As a result of this discussion, one of the children talked about an incident that happened on her school bus, where the bus driver had been kissing the girls on the cheek and hugging them. Shortly thereafter, C.T. told Owens that she wanted to tell her something. Owens walked over to C.T. and C.T. told her very quietly that the previous summer she and her brother went on a bike ride and, during the bike ride, C.T. had to go to the bathroom. C.T. told Owens that after she went to the bathroom, one of the older boys, Kyle, asked her, "can I feel if you are dry," and when C.T. acquiesced, he "put his finger in her [vagina]." 1 RP at 68. C.T. then told Owens that, after the bathroom break, they went back to her grandmother's house and she asked the same boy to peel an apple for her and he said, "only if you let me touch you," and C.T. said, "no, I'll have my grandma do it." 1 RP at 36. C.T. only described the older boy, Kyle, touching her. Owens asked if C.T. had told her mother and C.T. stated that she had not because she was afraid her mother would slap her.

When C.T.'s mother arrived to pick up her children, Owens told her what C.T. had revealed to her earlier. C.T.'s mother then sat down with C.T. and asked her about what she had told Owens. C.T. revealed to her mother that, during a bike ride with her brother and two older

boys at her grandmother's house the previous summer, she had stopped to go to the bathroom in the bushes. C.T. further revealed that as she was pulling up her pants, the older boy, Kyle, asked if he could "see if [she was] dry," or "are you dry," and he "put his . . . hand between her legs and his finger in her vagina"; when she said "ow," he pulled his hand back. 2 RP at 132. C.T. told her mother that she did not think anyone else saw what happened. C.T. also told her mother that, after she returned to her grandmother's house, she asked the same boy to peel an apple for her and he said, "let me touch you and I'll do it," but she refused and said, "never mind, I'll ask my grandma," and she took the apple back. 2 RP at 133. After talking to C.T., her mother called the police.

Shortly after C.T.'s mother filed the police report, Detective Norton from the Child Abuse Intervention Center contacted her and C.T. to investigate the allegations of sexual abuse. On March 8, 2006, C.T. repeated the statements that she had made to her mother and Owens about the molestation and the apple incident. But she added that, after Kyle put his finger inside her vagina, Klinton walked up to her and "touched the outside of her private part." 2 RP at 283. C.T. told Norton that the brothers witnessed each other touching her. When Norton asked C.T. why she had not shared the information about Klinton previously, she stated it was because Kyle "did the worse stuff to her." 2 RP at 286.

Detective Norton also interviewed Kyle and Klinton. Norton advised both brothers of their *Miranda*[3] rights, which they stated they understood and chose to waive. Kyle and Klinton admitted going on the bike ride with C.T., A.T., and LaRay, and recalled stopping to go to the bathroom. Kyle admitted that he stood near C.T. while she went to the bathroom but did not

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

watch because he knew it was inappropriate; Klinton stated that he was not near C.T. when she went to the bathroom. Both brothers denied ever touching C.T. or asking to touch C.T. According to Norton, Klinton stated that Kyle went with C.T. when she went to the bathroom and that, when the two of them walked back up the path, C.T. acted differently and did not want to be near Kyle.

Approximately one month after the interview with Detective Norton, C.T.'s mother took her to see Dr. Stirling for a physical examination. Stirling had previously been C.T.'s mother's pediatrician and had treated C.T. when she was an infant. Following her physical examination, C.T. told Stirling that Kyle "[w]ent to check to see if I was dry, and he went up too far and it hurt" and that, on the ride, he kept asking if he could touch her genitals again. 2 RP at 240. According to Stirling, his physical examination of C.T. did not uncover any signs that she either was or was not abused but, given her type of allegation and the time that had elapsed, he would not expect to find any signs of trauma.

Procedural History

On March 30, 2006, the State charged Kyle and Klinton as co-defendants. The State charged Kyle with one count of first degree child rape, one count of first degree child molestation, and one count of attempted first degree child molestation. The State charged Klinton with one count of first degree child molestation. Later, the State amended the information to charge the first two counts against Kyle in the alternative.

Citing *Bruton*, Kyle sought to have his trial severed from Klinton's trial, arguing that Klinton had made several statements against Kyle's interests that were admissible in Klinton's trial but should not be admissible in Kyle's trial. Klinton's trial counsel did not seek to join in the

motion to sever. After the State agreed not to elicit testimony about the statements in its case-in-chief, the trial court denied the motion.

Before trial, the State twice gave Kyle and Klinton written notice required by RCW 9A.44.120, the child hearsay statute, that it intended to call four witnesses to testify to statements C.T. made concerning her claims of sexual abuse.[4] The second notice listed C.T.'s mother, Detective Norton, Owens, and A.T. Neither of these witness lists included Dr. Stirling. On December 21, 2006, the trial court held a *Ryan*[5] hearing to determine the admissibility of C.T.'s statements to the listed witnesses. Both defendants attended the hearing. The State called C.T., C.T.'s mother, Owens, A.T., and Norton. C.T. testified that she could not identify the boys who

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[4] RCW 9A.44.120 states:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
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> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
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> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

[5] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

she said had molested her. Although C.T.'s mother and Owens testified that C.T. told them about only one individual touching her, C.T. testified that she told her mother and Owens about both boys. Later in the hearing, C.T. stated that she had lied in earlier testimony and she could, in fact, identify both Kyle and Klinton as the boys who touched her vagina, and she knew that Kyle was the individual who put his finger inside of her, while Klinton was the individual who only touched her on the outside of her vagina.

Following the hearing, the trial court determined that (1) C.T. was competent to testify and had testified and been subject to cross-examination, and (2) there was sufficient indicia of reliability to allow C.T.'s mother, Owens, and Detective Norton[6] to testify regarding C.T.'s statements to them about the alleged sexual abuse.

Before trial, Kyle and Klinton sought to exclude Dr. Stirling as a witness, arguing that his physical examination of C.T. failed to substantiate her claims of abuse. The State responded that his testimony about the examination was relevant and that the trial court should allow Stirling to testify regarding C.T.'s statements to him under the child hearsay statute as well as under the medical diagnosis exception to the hearsay rule. Kyle and Klinton responded that they had not received the notice required by the child hearsay statute that Stirling intended to testify about C.T.'s statements. The trial court ruled that the State had failed to meet the factual requirements for admissibility under the medical diagnosis exception to the hearsay rule, but that Stirling could testify to C.T.'s statements regarding Kyle under the child hearsay statute. Because C.T. only made one statement about Klinton and it was in response to a question by Stirling, the trial court

[6] The trial court did not rule regarding the admissibility of A.T.'s testimony because the State had previously conceded that his testimony was not admissible under RCW 9A.44.120.

ruled that Stirling could not testify about C.T.'s statement to him that Klinton touched her.

Dr. Stirling testified about his credentials and background, as well as his physical examination of C.T., which he stated neither corroborated nor undercut C.T.'s allegations of abuse. He also testified that, given C.T.'s allegations of digital penetration and the passage of time, he would not expect to find any physical evidence of abuse because any injury would have healed quickly. He also repeated C.T.'s allegations that Kyle put his finger inside of her.

At trial, C.T. unequivocally identified both Kyle and Klinton as the boys who molested her. She also testified that the bike she rode was her bike, while previously she had stated that she had to borrow a friend's bike to go on the bike ride. In addition, she conceded that she had only told her mother and Owens about Kyle, not Klinton. Kyle's trial counsel did not impeach C.T. on any of these inconsistencies or question her about lying during the *Ryan* hearing about being able to identify Kyle and Klinton as the boys who had molested her.

Following the State's case, Klinton chose to testify on his own behalf. He admitted going on a bike ride with C.T., A.T., and LaRay, but denied that he touched C.T. in a sexual or otherwise inappropriate way. Klinton denied that he told Detective Norton that Kyle had gone with C.T. when she went to the bathroom or that, when they came back, C.T. was upset and no longer wanted to be around Kyle. Kyle also testified on his own behalf and denied that he had sexually abused, or attempted to sexually abuse, C.T.

At the close of the defenses' case, the State recalled Detective Norton to rebut Klinton's testimony. Norton testified that Klinton had told him that his brother went with C.T. when she had to go to the bathroom and that, when they returned, C.T. acted differently and no longer wanted to be around Kyle. Kyle's attorney did not object.

The jury entered a verdict finding Kyle guilty of first degree child molestation, but not guilty of attempted child molestation and child rape. The jury also entered a verdict finding Klinton guilty of first degree child molestation. Following preparation of a presentence investigation report by the Department of Corrections, the trial court sentenced Kyle to 120 months to life in prison under former RCW 9.94A.712 (2001). The trial court sentenced Klinton to life in prison with a minimum mandatory term of 80 months before he is eligible for parole.

Kyle and Klinton timely appeal.

ANALYSIS

Severance of Trials

In response to C.T.'s allegations, Detective Norton interviewed the brothers. Norton claimed Klinton told him that Kyle went with C.T. when she went to use the bathroom and that subsequently C.T. acted differently and did not want to be near Kyle. Based on this statement, which, during trial, Klinton denied making, Kyle moved to sever his trial from Klinton's trial citing *Bruton*.

We review a trial court's decision to deny a severance motion for manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990); *State v. King*, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court also abuses its discretion when it erroneously interprets the law. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Here, the trial court relied on *Bruton* when it denied Kyle's motion to sever. In *Bruton*, the Supreme Court held that, despite clear, concise, and understandable instructions, the admission of a defendant's *confession* implicating his co-defendant as substantive evidence at a joint trial was prejudicial error. To comply with *Bruton*, our Supreme Court adopted CrR 4.4(c), which provides that the trial court "shall" grant a defendant's motion for severance unless the State agrees not to use the statement in its case-in-chief or deletes all reference to the moving defendant. Here, the State agreed not to use Klinton's statement as substantive evidence in its case-in-chief and the trial court denied Kyle's motion to sever.

But although the statement at issue implicated Kyle, Klinton did not confess or implicate himself with the statement in any manner. Thus, Klinton's statement is merely an out-of-court statement that is inadmissible evidence of the truth asserted, hearsay, and the trial court's reliance on *Bruton* was misplaced. Nevertheless the trial court's decision to deny severance was proper.

We review a trial court's decision to deny a severance motion for manifest abuse of discretion. *King*, 113 Wn. App. at 290. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. Separate trials are not favored in Washington. *State v. Herd*, 14 Wn. App. 959, 963, 546 P.2d 1222 (1976), *review denied*, 88 Wn.2d 1005 (1977). "The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission." *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971). Before trial, Kyle's trial counsel moved to sever the cases on the grounds that trying the brothers together violated *Bruton*; the State agreed that it would safeguard Kyle's confrontation rights by not

offering Klinton's statement in its case-in-chief.

Klinton's statement was a prior inconsistent statement that was offered and admitted only to impeach Klinton's testimony that he had not told Detective Norton that Kyle went with C.T. while she went to the bathroom and that afterwards she acted differently towards Kyle and did not want to be around him. *See* ER 613.[7] The trial court instructed the jury that Klinton's prior statement could be used only in evaluating the credibility of the witness' testimony.[8]

We turn now to the discrete issues raised by each brother.

Kyle Vinsonhaler

A. Child Hearsay Statute

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[7] ER 613: Prior Statements of Witnesses, states:

> **(a) Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.
>
> **(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[8] At oral argument before this court, Klinton's counsel argued for the first time that when more than one defendant testifies, this limiting instruction somehow allows the jury to evaluate the credibility of *any* witness's testimony. We do not consider arguments that the parties do not brief and then subsequently raise for the first time during oral argument. *State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992) (issues raised for the first time in oral argument before the Court of Appeals need not be considered). Moreover, we assume that the jury did not follow such a strained reading of the instruction and instead read it in a normal, common sense fashion. *See, e.g.*, *State v. Moultrie*, 143 Wn. App. 387, 177 P.3d 776 (an ordinary juror gives a jury instruction an ordinary, rather than strained, reading), *review denied*, 164 Wn.2d 1035 (2008); *State v. Holt*, 56 Wn. App. 99, 106, 783 P.2d 87 (1989) (an instruction is not erroneous where it is "'readily understood and not misleading to the ordinary mind'") (quoting *State v. Foster*, 91 Wn.2d 466, 480, 589 P.2d 789 (1979)), *review denied*, 114 Wn.2d 1022 (1990).

Kyle argues that the trial court erred when it allowed Dr. Stirling to testify regarding statements that C.T. made to him. Specifically, Kyle argues that the State failed to give him notice that it intended to elicit testimony from Stirling about these statements as required by the child hearsay statute because, when the trial court conducted the child hearsay hearing, Stirling's testimony was not included. RCW 9A.44.120. But Stirling was listed as a State's witness and Kyle's counsel had an opportunity to review his reports and interview him before trial. This notice was sufficient to satisfy RCW 9A.44.120.

The child hearsay statute, RCW 9A.44.120, requires the State to notify the defendant of its intent to offer a child hearsay statement, but the statute itself does not prescribe the form of the notice required. Instead, the notice requirement is derived from the "catch-all" hearsay exception under former Fed. R. Evid. 803(24) (1974)[9]; *State v. Hughes*, 56 Wn. App. 172, 174, 783 P.2d 99 (1989). Courts have interpreted former Fed. R. Evid. 803(24) to require sufficient notice to provide the adverse party with a fair opportunity to prepare to challenge the admissibility of the statement. *United States v. Bailey*, 581 F.2d 341, 348 (3rd Cir. 1978); *United States v. Frazier*, 678 F. Supp. 499, 503 (E.D. Pa.) (while "better practice" would be to provide formal notice, defense was not prejudiced because it received statements five weeks before trial), *aff'd*, 806 F.2d 255 (3rd Cir. 1986). Without proper notice, statements of abuse to a third party are not admissible. *Ryan*, 103 Wn.2d 165. Washington courts have not explored just what level of notice the State must give the defense in advance of the admission of testimony under the child hearsay statute.

The Ninth Circuit has held that appellate courts should review the trial court's ruling

[9] Transferred to Fed. R. Evid. 807, effective Dec. 1, 1997.

regarding the sufficiency of notice under former Fed. R. Evid. 803(24)[10] for an abuse of discretion and that the admission of statements without prior notice was *not* an abuse of discretion when the defendant could not demonstrate prejudice and did not request a continuance. *Hughes*, 56 Wn. App. at 175 (citing *United States v. Brown*, 770 F.2d 768 (9th Cir.), *cert. denied*, 474 U.S. 1036 (1985)).

Kyle relies on *State v. Lopez*, 95 Wn. App. 842, 980 P.2d 224 (1999), to support his argument that Dr. Stirling should not have been permitted to testify regarding the statements C.T. made to him. In *Lopez*, the State charged the defendant with two counts of first degree child molestation and three counts of first degree rape against three of his five children. 95 Wn. App. at 845. Prior to trial, the State listed a social worker as one of its witnesses, giving notice that the witness had interviewed the children and would be testifying to their statements of abuse under the medical diagnosis exception to the hearsay rule. *Lopez*, 95 Wn. App. at 846.

The trial court found that the statements were admissible under the medical diagnosis exception to the hearsay rule, as well as under the child hearsay statute. *Lopez*, 95 Wn. App. at 845. On appeal, the defendant argued that the trial court should not have admitted the testimony under the child hearsay statute because the State had not given sufficient notice of its intent to use this hearsay exception. *Lopez*, 95 Wn. App. at 851. The *Lopez* court found that, under the unique facts of that case, the defendant was afforded sufficient opportunity to meet and contest the statements because the trial court had previously ruled that they were admissible under the

[10] Former Fed. R. Evid. 803(24) provides: "[A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

medical diagnosis exception to the hearsay rule and, as a result, the defendant was prepared for the State's use of the statements. 95 Wn. App. at 851. Kyle argues that, unlike *Lopez*, he was not afforded notice that the State intended to use the statements under any exception to the hearsay rule until shortly before trial.

But the State listed Dr. Stirling as a witness very early on in the proceedings and defense counsel received copies of Stirling's report containing the substance of the statements at issue well before trial. Although Kyle was not given formal notice of the State's intent to seek admissibility under the child hearsay statute until the morning of trial, the State had timely provided Kyle with the statements during discovery and sought to admit them under the medical diagnosis exception to the hearsay rule. In *Frazier*, the court held that failure to give pretrial notice is excused where the adverse party had an opportunity to attack the trustworthiness of the evidence. *United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993), *cert. denied*, 510 U.S. 1080 (1994); *Brown*, 770 F.2d at 771. Kyle had such an opportunity here. The State timely provided Stirling's report during discovery and Kyle did not move for a continuance or claim that he was unable to meet the evidence, suggesting that he was prepared to meet these statements and was not ambushed by the State's attempt to admit the evidence. *See Hughes*, 56 Wn. App. at 175. Because Kyle had a fair opportunity to prepare to meet the statements and had actual knowledge of the State's intent to admit the hearsay statements, the trial court's decision to allow Stirling to testify under the child hearsay statute rather than the medical diagnosis exception to the hearsay rule did not prejudice Kyle.

Moreover, Dr. Sterling's testimony was admissible under the medical diagnosis exception to the hearsay rule. *State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505, *review denied*, 112

Wn.2d 1014 (1989).

ER 803(a)(4) provides an exception for

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Generally, to determine whether a statement was made for purposes of medical diagnosis or treatment, courts look to whether (1) the declarant's motive was to promote treatment, and (2) the medical professional reasonably relied on the statement for treatment purposes. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004) (citing *Butler*, 53 Wn. App. at 220). But where, as here, the patient is a child victim, our Supreme Court has held it is "'not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability.'" *Grasso*, 151 Wn.2d at 20 (quoting *State v. Ashcraft*, 71 Wn. App. 444, 457, 859 P.2d 60 (1993)); *see also State v. Kilgore*, 107 Wn. App. 160, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002).

Here, the trial court erred when it found that C.T.'s statements did not fall under the medical diagnosis exception to the hearsay rule because she did not make the statements for the purpose of receiving treatment. Dr. Stirling was acting in his professional capacity as a pediatrician when C.T. told him that Kyle had molested her. Whether C.T. made her statements with the intent to assist in her treatment is unclear, but because there is other indicia of reliability and indirect evidence of corroboration, such a finding was not required. *See State v. Swan*, 114 Wn.2d 613, 623, 790 P.2d 610 (1990) (child's behavior with anatomically correct dolls and emotional response), *cert. denied*, 498 U.S. 1046 (1991); *State v. Swanson*, 62 Wn. App. 186,

195, 813 P.2d 614 (behavioral changes, bed wetting, nightmares, fear of defendant, and precocious sexual conduct or knowledge), *review denied*, 118 Wn.2d 1002 (1991).

Not only did the trial court find that C.T. was reliable when it admitted Dr. Stirling's testimony under the child hearsay statute, C.T.'s mother testified that, following the incident, C.T. began exhibiting behavioral changes, such as "[n]ightmares; reluctan[ce] to go to [grandma's house]; even when [they] did go, [C.T.] didn't want to . . . ride her bikes [or] play outside." 2 RP at 129. C.T.'s mother further testified that C.T. began "whimpering or whining, [and] crying . . . in her sleep" and began to have urinary incontinence issues. 2 RP at 129. Thus, Stirling's testimony was admissible under either the child hearsay statute or the medical diagnosis exception to the hearsay rule.

B. Ineffective Assistance of Counsel

Next, Kyle argues that he received ineffective assistance from his counsel because his attorney failed to request a limiting instruction following impeachment testimony against his brother. But in his proposed instructions to the jury, Kyle's trial counsel proposed a limiting instruction identical to the one the trial court gave the jury. Jury instruction 7 stated: "[e]vidence of prior inconsistent statements by witnesses has been admitted for impeachment purposes only. This evidence may be considered by you for the sole purpose of weighing the witness's credibility and must not be considered by you for any other purpose." Clerk's Papers (CP) (Kyle) at 80. Thus, Kyle's trial counsel did request a limiting instruction regarding the impeachment testimony. And a party may not request an instruction and later complain on appeal that the trial court gave the requested instruction. *State v. Vander Houwen*, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

C. Statement of Additional Grounds

Kyle filed a SAG.[11] Although the statement need not contain citations to the record or to authority, it must "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c). Several of Kyle's stated grounds and arguments are difficult to understand but we have done our best to address them.

1. Failure to Seek a Grand Jury Indictment

Kyle argues that the State violated his right to due process because it failed to convene a grand jury and instead allowed the prosecutor to file a certificate of probable cause. But the State charged Kyle with violating a state law, not a federal law. Thus, article I, section 25 of the Washington constitution applied, which provides that the State may prosecute offenses by information or by indictment. *See State v. Nordstrom*, 7 Wash. 506, 508, 35 P. 382 (1893) (article I, section 25 of the Washington Constitution is not repugnant to clause I of the Fifth Amendment to the United States Constitution), *aff'd*, 164 U.S. 705, 17 S. Ct. 997, 41 L. Ed. 1183 (1896). *See also State v. Ng*, 104 Wn.2d 763, 774-75, 713 P.2d 63 (1985) (due process does not require a grand jury indictment); *State v. Westphal*, 62 Wn.2d 301, 302, 382 P.2d 269 (article 1, section 25 of the Washington constitution does not contravene the rights protected under the Fifth Amendment to the federal constitution), *cert. denied*, 375 U.S. 947 (1963).

2. Certificate of Probable Cause

Kyle also argues that the prosecutor created an impermissible conflict of interest when he filed the certificate of probable cause because he was acting as "both advocate and witness in the same proceeding," which is not permitted under RPC 3.7. SAG at 1. But it is the prosecutor's

[11] RAP 10.10.

duty to advocate for the State's position based on the evidence; the prosecutor does not act as a witness by merely reciting the evidence available to the State. *See Kalina v. Fletcher*, 522 U.S. 118, 130-31, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (a prosecutor properly acts as an advocate when he conveys information to the court in support of the State's certificate of probable cause).

3. Ineffective Assistance of Counsel

Kyle argues that trial counsel, as a member of the WSBA, had a conflict of interest that denied him effective assistance of counsel. Specifically, Kyle argues that because his attorney is a member of the WSBA, he "has a pre-emtive [sic] duty to the interest of the . . . 'State of Washington' over [Kyle]," which creates a conflict of interest prohibited by RPC 1.7. SAG at 12. Kyle also argues that, because of this conflict, he was denied an adequate preparation period before trial as well as "[t]he right to be represented by a counsel of [his] choice" because he is prohibited under the "Bar Act" from selecting an attorney who does not belong to the WSBA. SAG at 12-13. Lastly, he argues that, even if this court finds that his attorney's membership in the WSBA is not an impermissible conflict, his attorney was ineffective because he should have objected to Dr. Stirling's testimony because he was a "[p]aid [s]tate [w]itness." SAG at 13.

But these claims are without merit because Kyle fails to show an actual conflict or explain how this alleged "conflict" adversely affected his representation. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983) ("reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance").

4. *Miranda*

Kyle also argues that he was denied his right to counsel because he did not have an attorney present "during every stage of the criminal proceeding's [sic]." SAG at 8. Specifically, Kyle argues that he should have had appointed counsel with him when Detective Norton questioned him. To the extent that Kyle is arguing he was not properly given his *Miranda* warning, his argument fails. Here, Norton testified that he read Kyle his *Miranda* warnings and that Kyle informed him that he understood those rights and chose to waive them.

5. Competency

Lastly, Kyle states that he is "severly [sic] mentally disabled . . . with an I.Q. from 70 to 80," and that he "does not . . . have a vague sense of just what he was found guilty of." SAG at 1. To the extent that Kyle is arguing that he was not competent to stand trial, his argument fails. Kyle's trial counsel stipulated to his competency after a defense psychiatrist deemed Kyle competent.

Klinton Vinsonhaler

A. Ineffective Assistance of Counsel

Klinton argues that he received ineffective assistance from his counsel because his attorney failed to (1) move to sever his trial, (2) request a limiting instruction following Dr. Stirling's testimony, (3) impeach C.T. in a "meaningful fashion," and (4) object during the State's closing argument to its "mischaracteriza[tion]" of A.T.'s testimony. Br. of Appellant (Klinton) at 18-19.

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) that deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We presume that trial counsel was effective and counsel's legitimate trial strategy or tactics cannot support a claim of deficient performance.

State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

1. Severance of Klinton and Kyle's Trial

Klinton argues that he received ineffective assistance of counsel because his trial attorney failed to move to sever his case. Specifically, Klinton argues that his attorney should have moved to sever the trial on the grounds that the evidence against Kyle was substantially stronger than the evidence against him, and much of that evidence, such as Dr. Stirling's testimony, would have been inadmissible against Klinton alone. Stirling's testimony did not reference Klinton, but the mere fact that evidence is admissible against one defendant and not another does not necessitate severance and Klinton's counsel was not ineffective for failing to move to sever on this basis.

Generally, failure to bring a motion to sever and renew it during trial renders the issue waived. CrR 4.4. But failure to bring a motion to sever can be raised and considered in a claim for ineffective assistance of counsel. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). To prove he was prejudiced by his joint trial with Kyle, Klinton must show that (1) a competent attorney would have moved for severance, (2) that the motion likely would have been granted, and (3) that if he were tried separately, there was a reasonable probability that he would have been acquitted. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Under CrR 4.4(c)(2)(i), a trial court has broad discretion to grant a severance when "it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant." But separate trials are not favored in Washington because of concerns for judicial economy, "'[f]oremost among these concerns is the conservation of judicial resources and public funds.'" *In re Davis*, 152 Wn.2d at 711 (alteration in original) (quoting *Bythrow*, 114 Wn.2d at 723). A defendant seeking to sever his trial from a co-defendant's has "'the burden of demonstrating that a

joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.'" *In re Davis*, 152 Wn.2d at 711-12 (quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). We infer prejudice from

> "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants."

State v. Jones, 93 Wn. App. 166, 171-72, 968 P.2d 888 (1998) (quoting *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996)), *review denied*, 138 Wn.2d 1003 (1999).

Here, the trial court considered whether Kyle's and Klinton's cases should be severed for trial on Kyle's motion. It denied that motion. Even if we assume for the sake of argument only that a competent attorney would have moved to sever Klinton's trial also, Klinton has not shown that the trial court would have granted his motion when it denied Kyle's motion. The record does not support a determination that the joint trial was so "manifestly prejudicial" as to outweigh the trial court's concern for judicial economy. Kyle and Klinton did not have antagonistic defenses, the case was not complex, Kyle did not make any statements inculpating Klinton, and Klinton's statements inculpating Kyle were excluded as substantive evidence. Although Dr. Stirling's testimony that C.T. disclosed to him that Kyle had molested her would

not have been admissible against Klinton if he was tried alone,[12] "[t]he mere fact that evidence may be admissible against one defendant and not against another is not in and of itself proof that the two defendants cannot have a fair trial if tried together." *State v. Courville*, 63 Wn.2d 498, 501, 387 P.2d 938 (1963); *see also State v. Philips*, 108 Wn.2d 627, 640, 741 P.2d 24 (1987) ("[t]he mere fact that evidence admissible against one defendant would not be admissible against a co-defendant if the latter were tried alone does not necessitate severance").

The trial court instructed the jury that

> [a] separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.

CP (Kyle) at 76.

Moreover, C.T. testified at trial that both brothers had molested her nearly simultaneously. Under CrR 4.3(b)(3)(ii), two or more defendants may be joined in the same charging document when it is alleged that the offenses charged "were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others." Ultimately, the case against Kyle and Klinton rested on C.T.'s testimony and the jury's determination of her credibility as a witness. The trial court gave separate jury instructions requiring that, in order to find Klinton guilty of first degree child molestation, the jury had to find

[12] Klinton also seems to suggest that Dr. Stirling's testimony constituted an improper opinion on C.T.'s credibility. *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (a witness may not give an opinion as to another witness's credibility). But here, the State asked Stirling to offer his expert opinion on the results of his physical examination of C.T. and to relay C.T.'s statements to him regarding the abuse. Stirling testified that C.T.'s physical examination was "quite normal," and that he "couldn't say from the examination whether she had been abused or not." 2 RP at 242. When Stirling testified as to C.T.'s statements, he simply reiterated what C.T. had told him; he did not comment that he believed C.T.'s account or that either Klinton or Kyle was guilty.

that *he* had sexual contact with C.T. during the summer of 2005. The jury believed C.T.'s testimony that Klinton put his hand on the outside of her vagina and did not believe Klinton's testimony to the contrary. *See* RCW 9A.44.020(1) (in order to convict a person of a sex offense it is not necessary that the alleged victim's testimony be corroborated).

2. Impeachment of C.T.

Next, Klinton argues that he received ineffective assistance from his counsel because his trial counsel failed to impeach C.T. in a "meaningful fashion." Br. of Appellant (Klinton) at 18. Specifically, Klinton argues that his trial counsel should have impeached C.T. "on her refusal/failure to initially identify either [Kyle or Klinton] at the [pre-trial] hearing," and that his trial counsel should have questioned C.T. about "having lied under oath at [the pre-trial] hearing," and "the inconsistencies in her testimony between the [pre-trial] hearing [and] the trial." Br. of Appellant (Klinton) at 18. The State argues that this was a tactical decision within the realm of reasonable representation. We agree.

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967). In assessing Klinton's claim that his trial counsel did not effectively cross-examine C.T., we need not determine why trial counsel did not more aggressively impeach C.T. if that approach falls within the range of reasonable representation. *Stockman*, 70 Wn.2d at 945. Although, in retrospect, we may speculate as to whether a trial attorney could have "more efficiently attacked the credibility of [a] witness[, t]he extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict," which is a matter of judgment and strategy. *Stockman*, 70 Wn.2d at 945.

Here, Klinton's trial counsel's decision on how to cross-examine C.T. was a tactical decision and, given C.T.'s age and allegations, was within the range of reasonable representation. Furthermore, although Klinton's trial counsel did not aggressively impeach C.T., counsel repeatedly emphasized that the claims against Klinton did not arise when C.T. initially disclosed the abuse to her mother and Owens but, rather, only mentioned Klinton after speaking to Detective Norton, and also stressed the nearly six-month delay between the incident and her disclosure. Because there is a tactical and strategic justification for trial counsel's decision not to roughly impeach C.T. on the stand, Klinton's ineffective assistance of counsel claim fails.

3. State's Closing Argument

Klinton also argues that his trial counsel was ineffective for failing to object when, during closing argument, the State "mischaracterized A.T.'s testimony to suggest that A.T. saw Klinton go down to the area where Kyle had gone with C.T." Br. of Appellant (Klinton) at 19. But Klinton's argument lacks merit; rather than merely objecting to what she perceived to be a misstatement of the evidence, Klinton's trial counsel chose to address and correct the misstatement fully during closing argument.

Lawyers do not commonly object during closing argument "'absent egregious misstatements.'" *In re Davis*, 152 Wn.2d at 717 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993)). And a decision not to object during summation is within the wide range of permissible professional legal conduct. *In re Davis*, 152 Wn.2d at 717 (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Here, in closing argument, the prosecutor stated that A.T. testified that he "saw Klinton go down in the same general area" as Kyle and C.T., but that he could not see them. 3 RP at 522.

While A.T. initially testified that C.T. went down the hill and Kyle and Klinton went with her after he and LaRay went down the hill to the bathroom, he later clarified, stating that he was not sure where Klinton was because he was busy talking to LaRay. Although Klinton's trial counsel did not object to this mischaracterization of A.T.'s testimony, in her own closing argument she stated that, despite the State's submission to the contrary, to the best of her recollection, A.T. testified "that he never saw Klinton go down the path or be anywhere near [C.T.] on that bicycle ride." 3 RP at 536. Instead of objecting during the State's summation, Klinton's trial counsel chose to rebuke the State's misstatement in her own summation. Because there was a legitimate strategic or tactical reason for choosing not to object, it is not a basis for an ineffective assistance of counsel claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

B. Sufficiency of the Evidence

Klinton argues that sufficient evidence does not support his conviction for first degree child molestation. Specifically, he argues that no "reasonable juror could have concluded the State proved [its] case against Klinton . . . beyond a reasonable doubt" because the only evidence against him was C.T.'s allegation of abuse, which was made "after two interviews which were conducted unprofessionally" and was added "as an afterthought" during her interview with Detective Norton. Br. of Appellant (Klinton) at 20. But sufficient evidence supports Klinton's conviction.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of

fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (citing *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)), *review denied*, 119 Wn.2d 1011 (1992).

In order to prove first degree child molestation, the State must prove that (1) between June 1, 2005 and August 31, 2005, Klinton had sexual contact with C.T.; (2) C.T. was less than 12 years old at the time of the sexual contact and was not married to Klinton; (3) C.T. was at least 36 months younger than Klinton; and (4) that the act occurred in the State of Washington.[13] Jury instruction 14 defined sexual contact as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP (Kyle) at 87.

Because Klinton challenges the sufficiency of the evidence, he admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. *See Salinas*, 119 Wn.2d at 201. Klinton argues that the evidence against him was "remarkably weak," but the jury heard C.T.'s testimony that Klinton touched her on the outside of her vagina, and Detective Norton's testimony that C.T. volunteered this information to him during the course of the investigation; in addition, the jury heard Klinton deny C.T.'s allegations and chose not to believe him. Here, Klinton is effectively asking this court to reexamine the jury's determination of C.T.'s credibility and reweigh the evidence against him, but the jury serves as the sole judge of the credibility of

[13] Klinton does not dispute his age, C.T.'s age, C.T.'s marital status, or that these acts take place in Washington.

witnesses and the persuasiveness of the evidence. Sufficient evidence supports Klinton's conviction.

Accordingly, we affirm both Kyle and Klinton's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENOYAR, A.C.J.